

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 70584-g41B BY PETERSEN)	
LIVESTOCK)	

* * * * *

A Proposal for Decision in the above entitled matter was entered on January 26, 1990. On February 16, 1990, Objector Montana Power Company filed exceptions to the Proposal. On March 7, 1990, the Applicant filed a motion for an order striking the exception. The motion was based on the grounds that the exception was not filed in a timely manner. On March 14, 1990, the Department received Objector's brief in opposition to the motion.

Applicant's motion to strike Objector's exceptions is granted. The Proposal for Decision was mailed on January 26, 1990. Section 36.12.229 ARM allows 20 days for the filing of exceptions, and Section 36.12.209 ARM provides that service by mail is complete upon postmarking. Consequently, MPC had 20 days from January 26, 1990, or until February 15, 1990, in which to mail its exceptions to the Department. However, the Certificate of Service with the exceptions is dated February 16, 1990. Therefore, the exception was not timely.

Montana Power Company argues that it had an additional 3 days to file the exceptions under M.R.Civ.P. 6(e). However, these proceedings are governed by the rules for water right contested case hearings at ARM 36.12.201-233. The Rules of Civil Procedure

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may apply where specifically referenced by the water right contested case rules, see ARM 36.12.215(4), but are otherwise inapplicable. Rule 6(e) is not referenced by the rules governing these proceedings and is therefore not applicable.

Montana Power Company argues that Mont. Code Ann. § 2-4-106(1989) requires that rules for service in district court be applied to administrative proceedings. Section 2-4-106, however, concerns methods of service instead of time limits. The Board of Natural Resources and Conservation has authority to adopt time limits for water rights contested case procedures pursuant to Mont. Code Ann. § 85-2-113(1989). The Board determined that 20 days was sufficient for filing exceptions, ARM 36.12.229, and did not provide for an additional 3 days for service by mail. ARM 36.12.209.

Montana Power Company's exceptions are stricken, and no other exceptions were filed. The Department has reviewed the record and the Proposal for Decision and in accordance with ARM 36.12.229(2)(b)(ii) hereby issues its final decision as follows:

FINDINGS OF FACT

1. Petersen Livestock filed the above Application on December 14, 1988, at 10:00 a.m.
2. Applicant proposes to appropriate groundwater at 1,000 gallons per minute up to 350 acre-feet per year by means of a well on land owned by the Applicant in the SE¼NW¼SW¼ of Section 6, Township 8 South, Range 8 West, Beaverhead County, Montana. The period of appropriation would be from May 1 through October

15 of each year. The place of use would be on lands owned by the Applicant in Section 6 of said Township and Range, and in Section 31, Township 7 South, Range 8 West, Beaverhead County, Montana. (Department file and testimony of Robert Petersen).

3. The water would be pumped from the proposed well to be used for new sprinkler irrigation of 145 acres in the proposed place of use, specifically: 51 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$, 54 acres in the S $\frac{1}{2}$ NW $\frac{1}{4}$, 30 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 5 acres in the W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6 of Township 8 South, Range 8 West, and 5 in the S $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, Township 7 South, Range 8 West, Beaverhead County, Montana. (Department file.)

Robert Petersen testified that the proposed place of use had been sprinkler irrigated by Petersen Livestock since 1965 with water from springs in the N $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 6. According to Department records, the only water rights owned by the Applicant for irrigation water from said springs are those identified in Objector's Exhibits 1 and 2. Neither of those rights is for irrigating land in the place of use proposed in this Application.

4. The proposed irrigation would be of material benefit to the Applicant. (Testimony of Robert Petersen.)

5. Pertinent portions of the Application were published in the Dillon Tribune Examiner, a newspaper of general circulation in the area of the source, on April 25, 1989. Individual notice was sent by first-class mail to persons who, according to the records of the Department, may be affected by the proposed appropriation. (Department file.)

6. An Objection to Application was filed on May 10, 1989, by the Montana Power Company. No other objections were filed. The Montana Power Company based their objection on the allegation that the proposed appropriation would adversely affect their senior surface water rights. (Department file.)

The Montana Power Company has filed multiple Statements of Claim for Existing Water Rights for water use at eight dams on the Missouri River mainstem; the rights have been noticed as part of the record.

7. Applicant was informed by the Department that adjudication issues are presently being litigated involving the scope of Montana Power Company and U.S. Bureau of Reclamation existing water rights in judicial proceedings, and that the result of the proceedings may affect the validity of any provisional permit that may be issued to the Applicant. Applicant was coincidentally informed of the standing offer from the U.S. Bureau of Reclamation to contract with the Applicant for a firm water supply under the terms of a temporary water service contract. (Department file.)

8. Applicant has not executed a temporary water service contract with the U.S. Bureau of Reclamation to obtain water from Canyon Ferry storage. (Department file.)

9. During a telephone prehearing conference held on November 7, 1989, the parties agreed the extent of the Objector's existing water rights is not at issue in this case. (Department file.)

10. Groundwater in the amount applied for is obtainable 200 feet beneath the point of the Applicant's proposed well. Static water level readings from wells in the area, as shown in hydrographs, indicate water is present year round. The SCS expressed confidence there is sufficient water at the point of diversion to make the proposed project viable. (Objector's Exhibits 3 and 5, and testimony of Mr. Juvan.)

11. Applicant presently has a distribution system in place capable of applying the requested amounts to the proposed place of use. For guidance in developing the proposed well, Applicant has been relying on the SCS which has formulated preliminary system costs (including pumping unit) based on their conclusion that the project is physically viable. No testimony or evidence was given defining the specific means of diversion (i.e., pump size), but multiple references to similar groundwater diversion systems used by neighbors implied that the Applicant would be attempting to replicate those systems. (Objector's Exhibit 3, and testimonies of Mr. Petersen and Mr. Juvan.)

12. Although testimony conflicted as to whether layers of impermeable clay completely confine any of the water bearing strata in the area, all three expert hydrogeologists testifying at the hearing agreed that any effect on surface flows in the Beaverhead River from Applicant's proposed well would be imperceptible. Therefore, as a practical matter, Applicant's source is separate from surface flows.

13. Records kept on wells in the area show stable static water levels relative to seasonal importation of water for irrigation and relative to multi-year climatic fluctuations. In the summer of 1989, a recharge test performed on the Pearce well (located in SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, Township 8 South, Range 9 West, and 300 feet in depth) showed recharge characteristics essentially the same as when the well was drilled in March of 1984. Furthermore, testimony was given that Soil Conservation Service data show the source has substantial recharge capacity beyond what is presently being appropriated, and that the source is not over appropriated. (Objector's Exhibits 5, 6, and 7, testimony of Mr. Juvan, and log of Pearce well in Department records.)

14. The record does not reflect any planned uses or developments for which a pending or unperfected permit has been issued or for which water has been reserved with which the Applicant's appropriation would interfere.

The Missouri River system is presently involved in a water reservation process; however, as yet no reservations have been granted.

A review of the Department's records on the source proposed for appropriation by the Applicant does not disclose any planned uses or developments for which water has been reserved. The Department's records on the source proposed for appropriation do show one planned use and development for which a permit has been issued: Permit No. 35956-g41B issued April 23, 1989, to Jean M.

and Kenneth I. Rolandson (Notice of Completion due November 30, 1990) for a well approximately one mile from the Applicant's proposed well site. Notice of the Petersen Livestock Application was sent to Kenneth I. Rolandson on April 24, 1989, by first-class mail. No objection to the Petersen Livestock Application was filed by the owner of Permit No. 35956-g41B.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and the subject matter in this proceeding. Mont. Code Ann. §85-2-309 (1989). There is no question of the extent of MPC's existing rights. Finding of Fact 9. Consequently, there are no adjudicative facts for determination by the water court. Mont. Code Ann. § 85-2-309(2)(1989).

2. Proper notice was given to notify all potential parties of the proposed Petersen Livestock project. Finding of Fact 5.

3. The Department gave proper notice of the hearing and the matter is properly before the Hearing Examiner.

4. Irrigation is a beneficial use of water. Mont. Code Ann. § 85-2-102(2)(a)(1989), and Finding of Fact 4.

5. The Applicant has a possessory interest in the property where the water is to be withdrawn and where it is to be put to beneficial use. Finding of Fact 2.

6. Applicant has provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Mont. Code Ann. § 85-2-311(4)(1989), and Finding of Fact 11.

7. Applicant has provided substantial credible evidence that there is unappropriated water in the source of supply (a deep subsurface aquifer) at the times when Applicant can use it, in the amount requested throughout the proposed period of appropriation. Mont. Code Ann. § 85-2-311(4)(1989) and Findings of Fact 10 and 13.

8. Applicant has shown by substantial credible evidence that Objector's water rights will not be adversely affected. Findings of Fact 12 & 13. The Objector has alleged adverse effect from reduced surface flows through their hydropower facilities on the Missouri River but has presented no proof. When an Applicant has presented a case of no adverse effect, the Objectors must counter that case by proof of an adverse effect. See In the matter of the Application for Beneficial Water Use Permit No. 55749-g76LJ by Meadow Lake Country Club Estates, Final Order (January 27, 1988) at page 5; see also In the Matter of the Application for Change of Appropriation Water Right No. G15928-76H by Samuel T. and Virginia Allred, Proposal for Decision at page 23. Here Objectors did not counter Applicants case of no adverse effect.

There being no other allegations of adverse effect on the record, and no adverse effect to prior appropriators being on the face of the record, it is concluded that Mont. Code Ann. § 85-2-311(1)(b)(1989) is met.

9. Statements were made suggesting Applicant's proposed appropriation may be part of a cumulative depletion effect which

may be ongoing and insidious, or which may be initiated by the proposed appropriation. With regard to this Applicant's proposed appropriation, the Objector provided no testimony or evidence that incipient or hastened depletion of the proposed groundwater source will result. Applicant has no burden to disprove potential adverse effects for possible future projects, or to disprove speculative allegations. See In the Matter of the Application for Beneficial Water Use Permit No. 60117-g76L by William C. Houston, Proposal for Decision (April 24, 1987) at page 20.

If Objector wishes to seek answers to the questions raised concerning possible cumulative effects, the law provides a mechanism for pursuing answers, and controls, through Mont. Code Ann. § 85-2-319(1989), or Mont. Code Ann. §§ 85-2-506 and 507(1989). See specifically Mont. Code Ann. § 85-2-506(2)(b)(1989).

10. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. Finding of Fact 14.

While the Missouri River system presently is involved in a water reservation process, Applicant's proposed appropriation of groundwater would not interfere unreasonably with a reservation on the system, if such a reservation were to be granted by the Board of Natural Resources and Conservation. There would be no unreasonable interference because any such reservation will receive the priority date of July 1, 1985, which is senior to the

proposed appropriation. Furthermore, if the Department issues a permit prior to the granting of such a reservation, the Board may subordinate the reservation to the permit only if it finds that the subordination does not interfere with the purpose of the reservation. Mont. Code Ann. § 85-2-331(1989).

11. The Department has the authority and obligation to issue a water use permit if the statutory criteria have been met. Mont. Code Ann. § 85-2-311(1)(1989). The November 12, 1987, Agreement between the United States of America (Bureau of Reclamation), the Montana Power Company, and the Department does not preclude the Department from issuing a provisional permit to this Applicant. All procedural conditions established by the Agreement have been met. Finding of Fact 7. Under paragraph 4.c.(2) of the agreement, since the Applicant did not elect to execute a temporary water service contract with the United States (Finding of Fact 8), the Department must continue administrative proceedings regarding the application and certify to the chief water judge required adjudicative determinations. In this case, there are no required adjudicative determinations. The extent of the Objector's existing rights are not at issue and need not be determined for a final disposition of this case. Finding of Fact 9.

FINAL ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 70584-g41B is hereby granted to Petersen Livestock to

appropriate 1,000 gallons per minute up to 350 acre-feet of water per year from a well for use in new sprinkler irrigation.

The well shall be located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 8 South, Range 8 West, Beaverhead County, Montana. The period of appropriation shall be from May 1 through October 15 of each year. The place of use shall be on a total of 145 acres, specifically: 51 acres in the N $\frac{1}{4}$ SW $\frac{1}{4}$, 54 acres in the S $\frac{1}{4}$ NW $\frac{1}{4}$, 30 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 5 acres in the W $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6 of Township 8 South, Range 8 West, and 5 acres in the S $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, Township 7 South, Range 8 West, Beaverhead County, Montana. The priority date shall be 10:00 a.m., December 14, 1988.

This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

This permit is subject to § Mont. Code Ann. § 85-2-505(1989) requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately measured. The Permittee shall take static water level measurements on April 15 of each year, prior to

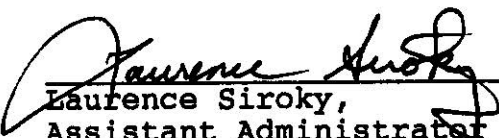
commencing irrigation, and again on November 15 of each year. The Permittee shall keep a written record of these measurements and submit them to the Department by November 30 of each year.

Issuance of this permit shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 17 day of September, 1990.


Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address this 17th day of September, 1990, as follows:

Petersen Livestock
3200 Highway 91 South
Dillon, MT 59725

Michael Zimmerman
General Counsel
Montana Power Company
40 E. Broadway
Butte, MT 59701

T. J. Reynolds
Field Manager
Helena Field Office
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Helena, MT 59624

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Attorney at Law
P.O. Box 345
Dillon, MT 59725



Cindy G. Campbell
Hearing Unit Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 70584-g41B BY PETERSEN LIVESTOCK)

* * * * *

Pursuant to §§ 85-2-121 and 85-2-309, MCA, a hearing was held in the above matter on November 15, 1989, at 10:00 a.m. in Dillon, Montana, to determine whether the above Application should be granted to Petersen Livestock under the criteria in § 85-2-311(1), MCA.

Applicant was represented by W. G. Gilbert, Jr., attorney.

Robert Petersen appeared as witness for the Applicant.

Eddie Juwan, consultant, appeared as expert witness for the Applicant.

Holly J. Franz, attorney, represented Objector Montana Power Company.

Jack Kelly, consultant, appeared as expert witness for the Objector. Richard H. Kennedy and William Uthman appeared as witnesses for the Objector.

EXHIBITS

Applicant's Exhibit 1 is a xerographic copy of the resume of Eddie Juwan, Engineering & Groundwater Geologist, Bozeman, Montana.

Objector's Exhibit 1 is a copy from microfilm of Statement Of Claim For Existing Water Rights, No. 41B-W-088699-00, filed by

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Petersen Livestock, Inc.

Objector's Exhibit 2 is a copy from microfilm of Permit To Appropriate Water, No. P1315-g41B, issued to Petersen Livestock, Inc.

Objector's Exhibit 3 is a xerographic copy of a letter dated March 9, 1989, from Marie Marshall, USDA-Soil Conservation Service (SCS) State Geologist, to Don Anderson, USDA-SCS Area Conservationist, concerning the proposed Petersen well.

Objector's Exhibit 4 is the resume of Jack E. Kelly, Vice President, James M. Montgomery, Consulting Engineers, Inc., Boise, Idaho.

Objector's Exhibit 5 and 5-Map consist of 20 xerographic copies of hydrographs developed by the Department of Natural Resources and Conservation (Department) depicting water well levels in selected wells in the general vicinity of the Applicant's proposed well site, and a map identifying the location of each respective well. Applicant objected to Objector's Exhibit 5 and 5-Map on the grounds of insufficient foundation, lack of particularization, irrelevance, and hearsay. Ruling was reserved. Objector's Exhibit 5 and 5-Map were later reintroduced and admitted without objection.

Objector's Exhibit 6 is a xerographic copy of 16 pages of Water Resources Data Montana Water Year 1988, U.S. Geological Survey Water Data Report MT-88-1 prepared in cooperation with the State of Montana and with other agencies, showing water levels in observation wells for 1988, 1987, 1986, 1985, and 1984.

Applicant objected to Objector's Exhibit 6 on grounds of irrelevance and lack of probative value. The objection was overruled.

Objector's Exhibit 7 consists of a 15-page computer-generated tabular summary of measurements taken of water levels in a United States Geological Survey (USGS) observation well located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 8 South, Range 9 West, Beaverhead County, and a one page hydrograph developed by the USGS from data in the table. Applicant objected to Objector's Exhibit 7 on grounds of insufficient foundation, lack of probative value, irrelevance, and hearsay. The objection was overruled.

Objector's Exhibit 8 is a map of selected wells in the general vicinity of Applicant's proposed well site. Water levels in the wells and water level contour lines are identified. Applicant objected to Objector's Exhibit 8 on grounds of irrelevance. Objection was overruled.

Objector's Exhibit 9 is a cross-sectional representation of land surface and groundwater levels in the vicinity of Applicant's proposed well site based on points and lines identified on Objector's Exhibit 8. Applicant objected to Objector's Exhibit 9 on grounds of irrelevance. Objection was overruled.

On Motion from the Objector filed October 10, 1989, administrative notice has been taken of the Honorable Gordon R. Bennett's decision in United States of America and Montana Power

Co. v. Montana Dept. of Natural Resources and Conservation, Cause No. 50612, Lewis and Clark County, Montana; the November 12, 1987, Agreement between the United States of America (Bureau of Reclamation), the Montana Department of Natural Resources and Conservation, and the Montana Power Company; and the Statements of Claim to Existing Water Rights filed by the Montana Power Company for water use at the Canyon Ferry, Hauser, Holter, Black Eagle, Rainbow, Ryan, Cochran, and Morony Dams and reservoir impoundments.

The Department file was reviewed by both parties and received into evidence without objection.

FINDINGS OF FACT

1. Petersen Livestock filed the above Application on December 14, 1988, at 10:00 a.m.

2. Applicant proposes to appropriate groundwater at 1,000 gallons per minute up to 350 acre-feet per year by means of a well on land owned by the Applicant in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 8 South, Range 8 West, Beaverhead County, Montana. The period of appropriation would be from May 1 through October 15 of each year. The place of use would be on lands owned by the Applicant in Section 6 of said Township and Range, and in Section 31, Township 7 South, Range 8 West, Beaverhead County, Montana. (Department file and testimony of Robert Petersen).

3. The water would be pumped from the proposed well to be used for new sprinkler irrigation of 145 acres in the proposed place of use, specifically: 51 acres in the N $\frac{1}{2}$ SW $\frac{1}{4}$, 54 acres in

the S½NW¼, 30 acres in the NW¼NW¼ and 5 acres in the W½NE¼NW¼ of Section 6 of Township 8 South, Range 8 West, and 5 in the S½SW¼SW¼ of Section 31, Township 7 South, Range 8 West, Beaverhead County, Montana. (Department file.)

Robert Petersen testified that the proposed place of use had been sprinkler irrigated by Petersen Livestock since 1965 with water from springs in the N½NW¼ of Section 6. According to Department records, the only water rights owned by the Applicant for irrigation water from said springs are those identified in Objector's Exhibits 1 and 2. Neither of those rights is for irrigating land in the place of use proposed in this Application.

4. The proposed irrigation would be of material benefit to the Applicant. (Testimony of Robert Petersen.)

5. Pertinent portions of the Application were published in the Dillon Tribune Examiner, a newspaper of general circulation in the area of the source, on April 25, 1989. Individual notice was sent by first-class mail to persons who, according to the records of the Department, may be affected by the proposed appropriation. (Department file.)

6. An Objection to Application was filed on May 10, 1989, by the Montana Power Company. No other objections were filed. The Montana Power Company based their objection on the allegation that the proposed appropriation would adversely affect their senior surface water rights. (Department file.)

The Montana Power Company has filed multiple Statements of Claim for Existing Water Rights for water use at eight dams on

the Missouri River mainstem; the rights have been noticed as part of the record.

7. Applicant was informed by the Department that adjudication issues are presently being litigated involving the scope of Montana Power Company and U.S. Bureau of Reclamation existing water rights in judicial proceedings, and that the result of the proceedings may affect the validity of any provisional permit that may be issued to the Applicant. Applicant was coincidentally informed of the standing offer from the U.S. Bureau of Reclamation to contract with the Applicant for a firm water supply under the terms of a temporary water service contract. (Department file.)

8. Applicant has not executed a temporary water service contract with the U.S. Bureau of Reclamation to obtain water from Canyon Ferry storage. (Department file.)

9. During a telephone prehearing conference held on November 7, 1989, the parties agreed the extent of the Objector's existing water rights is not at issue in this case. (Department file.)

10. Groundwater in the amount applied for is obtainable 200 feet beneath the point of the Applicant's proposed well. Static water level readings from wells in the area, as shown in hydrographs, indicate water is present year round. The SCS expressed confidence there is sufficient water at the point of diversion to make the proposed project viable. (Objector's Exhibits 3 and 5, and testimony of Mr. Juvan.)

11. Applicant presently has a distribution system in place capable of applying the requested amounts to the proposed place of use. For guidance in developing the proposed well, Applicant has been relying on the SCS which has formulated preliminary system costs (including pumping unit) based on their conclusion that the project is physically viable. No testimony or evidence was given defining the specific means of diversion (i.e., pump size), but multiple references to similar groundwater diversion systems used by neighbors implied that the Applicant would be attempting to replicate those systems. (Objector's Exhibit 3, and testimonies of Mr. Petersen and Mr. Juvan.)

12. A hydrologic connection exists between groundwater underlying the Blacktail Deer Creek valley and the Beaverhead River. The many water-bearing strata in the Tertiary Aquifer, the source from which the Applicant proposes to appropriate, are not separated by horizontally extensive layers of impermeable clays such that transmission of water from one stratum to another is impossible. Water in this aquifer moves: the shallower groundwater moves generally in the same direction as the surface water flows; the direction of movement of the deeper groundwater is difficult to know.

The groundwater contours and groundwater level cross-section of Objector's Exhibits 8 and 9 indicate that waters down to 100 feet below the Blacktail Deer Creek valley intersect in their subsurface flow with the Beaverhead River. Testimony was given that Poindexter Slough, the springs discussed in Finding of Fact

3 above, and marshy areas near the Beaverhead River are the results of intersections between the land surface and groundwaters in the course of their subsurface flow. These intersections support the base flows of the Beaverhead River.

Deeper groundwaters, such as those at the 200-foot depth of the proposed appropriation, may have some eventual hydrologic interconnection with the surface waters of the Missouri River system. Due to lenses and layers of clay that commonly divide water bearing strata in the proposed groundwater source, the waters at any given point beneath the surface may be semi-confined or confined, even to the degree that their movement is only by means of the permeability of the confining clays. Where and whether the deeper groundwater intersects with the surface, and how such intersection manifests itself, is not available from the record. (Testimonies of Mr. Juvan, Mr. Kelly and Mr. Uthman, and Objector's Exhibits 8 and 9.)

13. No depletion of the source aquifer has occurred. Records kept on wells in the area show stable static water levels relative to seasonal importation of water for irrigation and relative to multi-year climatic fluctuations. In the summer of 1989, a recharge test performed on the Pearce well (located in SE $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12, Township 8 South, Range 9 West, and 300 feet in depth) showed recharge characteristics essentially the same as when the well was drilled in March of 1984. Furthermore, testimony was given that Soil Conservation Service data show the source has substantial recharge capacity beyond what is presently

being appropriated, and that the source is not over appropriated. (Objector's Exhibits 5, 6, and 7, testimony of Mr. Juvan, and log of Pearce well in Department records.)

14. The record does not reflect any planned uses or developments for which a pending or unperfected permit has been issued or for which water has been reserved with which the Applicant's appropriation would interfere.

The Missouri River system is presently involved in a water reservation process; however, as yet no reservations have been granted.

A review of the Department's records on the source proposed for appropriation by the Applicant does not disclose any planned uses or developments for which water has been reserved. The Department's records on the source proposed for appropriation do show one planned use and development for which a permit has been issued: Permit No. 35956-g41B issued April 23, 1989, to Jean M and Kenneth I. Rolandson (Notice of Completion due November 30, 1990) for a well approximately one mile from the Applicant's proposed well site. Notice of the Petersen Livestock application was sent to Kenneth I. Rolandson on April 24, 1989, by first-class mail. No objection to the Petersen Livestock application was filed by the owner of Permit No. 35956-g41B.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and the subject matter in this proceeding. Section 85-2-309, MCA.

2. Proper notice was given to notify all potential parties

of the proposed Petersen Livestock project. Finding of Fact 5.

3. The Department gave proper notice of the hearing and the matter is properly before the Hearing Examiner.

4. Irrigation is a beneficial use of water. Section 85-2-102(2)(a), MCA, and Finding of Fact 4.

5. The Applicant has a possessory interest in the property where the water is to be withdrawn and where it is to be put to beneficial use. Finding of Fact 2.

6. Applicant has provided substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. Section 85-2-311(4), MCA, and Finding of Fact 11.

7. Applicant has provided substantial credible evidence that there is unappropriated water in the source of supply (a deep subsurface aquifer) at the times when Applicant can use it, in the amount requested throughout the proposed period of appropriation. Section 85-2-311(4), MCA, and Findings of Fact 10 and 13.

8. Regarding the question of adverse affect on Objector's water rights due to reduced surface flows through their hydropower facilities on the Missouri River mainstem, Objector has the burden of producing facts sufficient to raise allegations of adverse affect to a level of plausibility. See In the Matter of the Application for Beneficial Water Use Permit No. 55749-g76LJ by Meadow Lake Country Club Estates, Final Order (January 27, 1988) at page 5; see also In the Matter of the

Application for Change of Appropriation Water Right No.
G15928-76H by Samuel T. and Virginia Allred, Proposal for
Decision at page 23.

Objector alleges that Applicant's appropriation of subsurface water will adversely affect its surface water rights by reducing the amount of water ultimately supplied to the Missouri River drainage system. Although there may be a connection, however attenuated, between the proposed source and the Missouri River, the tributary nature thereof remains speculative. Finding of Fact 12. Mere speculation does not fulfill Objector's burden of production; accordingly, there is no burden on the Applicant to disprove the allegations.

Objector provided no testimony or evidence that water shortages have occurred at their facilities. Objector's senior status as a prior appropriator does not include the right to prevent changes by later appropriators in the condition of water occurrence, such as the decrease of streamflow or the lowering of a water table, if the prior appropriator can reasonably exercise its water rights under the changed conditions. Section 85-2-401, MCA.

There being no other allegations of adverse affect on the record, and no adverse affect to prior appropriators being on the face of the record, it is concluded that § 85-2-311(1)(b), MCA, is met.

9. Statements were made suggesting Applicant's proposed appropriation may be part of a cumulative depletion effect which

may be ongoing and insidious, or which may be initiated by the proposed appropriation. With regard to this Applicant's proposed appropriation, the Objector provided no testimony or evidence that incipient or hastened depletion of the proposed groundwater source will result. Applicant has no burden to disprove potential adverse effects for possible future projects, or to disprove speculative allegations. See In the Matter of the Application for Beneficial Water Use Permit No. 60117-g76L by William C. Houston, Proposal for Decision (April 24, 1987) at page 20.

If Objector wishes to seek answers to the questions raised concerning possible cumulative effects, the law provides a mechanism for pursuing answers, and controls, through § 85-2-319, or §§ 85-2-506 and 85-2-507, MCA. (See specifically § 85-2-506(2)(b), MCA.)

10. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. Finding of Fact 14.

While the Missouri River system presently is involved in a water reservation process, Applicant's proposed appropriation of groundwater would not interfere unreasonably with a reservation on the system, if such a reservation were to be granted by the Board of Natural Resources and Conservation. There would be no unreasonable interference because any such reservation will receive the priority date of July 1, 1985, which is senior to the proposed appropriation. Furthermore, if the Department issues a

permit prior to the granting of such a reservation, the Board may subordinate the reservation to the permit only if it finds that the subordination does not interfere with the purpose of the reservation. Section 85-2-331, MCA.

11. The Department has the authority and obligation to issue a water use permit if the statutory criteria have been met. Section 85-2-311(1), MCA. The November 12, 1987, Agreement between the United States of America (Bureau of Reclamation), the Montana Power Company, and the Department does not preclude the Department from issuing a provisional permit to this Applicant. All procedural conditions established by the Agreement have been met. Finding of Fact 7. Under paragraph 4.c.(2) of the agreement, since the Applicant did not elect to execute a temporary water service contract with the United States (Finding of Fact 8), the Department must continue administrative proceedings regarding the application and certify to the chief water judge required adjudicative determinations. In this case, there are no required adjudicative determinations. The extent of the Objector's existing rights are not at issue and need not be determined for a final disposition of this case. Finding of Fact 9.

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 70584-g41B is hereby granted to Petersen Livestock to appropriate 1,000 gallons per minute up to 350 acre-feet of water

per year from a well for use in new sprinkler irrigation.

The well shall be located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 8 South, Range 8 West, Beaverhead County, Montana. The period of appropriation shall be from May 1 through October 15 of each year. The place of use shall be on a total of 145 acres, specifically: 51 acres in the N $\frac{1}{4}$ SW $\frac{1}{4}$, 54 acres in the S $\frac{1}{4}$ NW $\frac{1}{4}$, 30 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 5 acres in the W $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 6 of Township 8 South, Range 8 West, and 5 acres in the S $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 31, Township 7 South, Range 8 West, Beaverhead County, Montana. The priority date shall be 10:00 a.m., December 14, 1988.

This permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any prior appropriator.

This permit is subject to § 85-2-505, MCA, requiring that all wells be constructed so they will not allow water to be wasted, or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of water may be stopped when not being put to beneficial use. The final completion of the well must include an access port of at least .50 inch so that the static water level in the well may be accurately measured.

Issuance of this permit shall not reduce the Permittee's liability for damages caused by exercise of this permit, nor does


the Department, in issuing this permit, acknowledge any liability for damages caused by exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served on all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 26th day of January, 1990.


John E. Stults, Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
1520 East Sixth Avenue
Helena, Montana 59620-2301
(406) 444-6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties

of record at their address this 26th day of January, 1990, as follows:

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